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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942

No. 654

ALBERT SCHIAPPI,

Petitioner,

vs.

WEST VIRGINIA LIQUOR CONTROL COMMISSION,
A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

PATRICK J. MCGUIRE,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

Patrick J. McGuire, Counsel for and on behalf of the Plaintiff in the above styled case prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Appeals of West Virginia in the above case.

Opinion Below

The opinion of the Court below is unreported but appears in the Record at page 27.

Jurisdiction

The Judgment of the Court below was rendered on date of November 16th, 1948, by a majority of the Court; two

Judges thereof dissenting and upon a granted petition for rehearing was affirmed and finally entered on date of December 18th, 1948.

The jurisdiction of this Court is invoked under Art. #3, Sec. #10 of the Constitution of West Virginia and U. S. Code Part. #3, Amend. 14, Sec. 1, Page 2.

Questions Presented

1. Is the Defendant an arm of the State and as such screened by the Constitutional Inhibition against suing the State?

2. Is the opinion violative of the 14th Amendment to the United States Constitution and the Constitution of West Virginia; as a denial of "Due process of Law"?

3. Is the suit one against the State?

4. Is the transaction so illegal as to bar a recovery?

The Constitutional provisions and the Statutes involved are set forth in the Appendix, *Infra,* pp. 5 to 8.

Statement

The findings of Fact of the Court below may be summarized as follows:

Plaintiff in Error, a licensed dealer in liquors, on date of June 11th, 1946, purchased 25 cases of whiskey from the Defendant and paid $800.00 as the price thereof. Seven (7) of these cases were delivered, and are a proper credit. Defendant refused to deliver the remainder of the shipment and also refused to refund the balance of the purchase money which amounts to $576.00, after the credit, and for this sum the Plaintiff sought a Judgment upon a Notice of Motion, Affidavit and Bill of Particulars.

Defendant appeared and filed its Counter Affidavit; its Demurrer, was later amended. Both Demurrers rely upon

Sec. #35 Art. VI of the Constitution of West Virginia, which provides in effect (the State shall not be made a party Defendant in any suit, etc.)

The Special Plea charged in effect the transaction was illegal and the Defendant's Agent acted beyond the scope of his authority. In the lower Court the Demurrers were sustained and the case dismissed and its decision affirmed by the Supreme Court of Appeals of West Virginia.

Specification of Errors

The opinion is erroneous, in the following particulars:

(a) Ignoring and refusing to treat with the major issue of the case, its being the question of "Due process of Law."

(b) Determining the Defendant to be immune to suit by Constitutional Provision.

(c) Finding the transaction illegal and unenforcible, and in this particular its misinterpretation of Chapter #60, Art. #4 of the Code of West Virginia.

(d) Refusing to consider and apply the provisions of the 14th Amendment of the Constitution of the United States and Art. #3, Sec. #10 of the Constitution of the State of West Virginia, and

Lastly: In refusing to recognize the principle of both law and fact, that the unlawful act of the Defendant is the wrongful act of individuals; is not the act of the State; *the suit for redress is not a suit against the State;* the unlawful act of the Defendant is not screened by the Constitutional inhibition against suing the State and the character of the Defendant is therefore wholly immaterial.

Reasons for Granting the Writ

The opinion in this case controverts the settled doctrine of the United States Supreme Court, stated and found in

Enc. U. S. Sp. Court Reports—Vol. #5, Page 678; *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 Ed., 185 Etc.

The opinion is violative of the 14th Amendment to the Constitution of the United States and Art. #3, Sec. 10 of the Constitution of the State of West Virginia.

The position of the Defendant is grossly dishonest; wholly without the scope of any reasonable concept of Justice and if permitted to stand will not only make Petitioner the victim of miscarried Justice, but will also establish a precedent inherently wrong, unconstitutional and inconsistent with the pronouncements and decisions of this Honorable Court.

WHEREFORE, it is respectfully submitted that this Petition should be granted.

PATRICK J. MCGUIRE.

March 10th, 1949.

APPENDIX

United States Constitutional Provision

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, 14th Amendment.

West Virginia Constitutional Provisions

Safeguards for Life, Liberty and Property

"No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

West Virginia Constitution, Article #3, Sec. 10.

Statutory Provisions—West Va. Code

West Va. Liquor Control Commission Created

"To Accomplish the purposes of this Chapter there is hereby created the 'West Virginia Liquor Control Commission,' which shall be a corporation, and, as such, may sue and be sued, contract and be contracted with, and it shall have a common seal."

West Va. Code 5907-(8) .

Sales at Retail and Wholesale

"The sale of alcoholic liquors at wholesale and retail in this State shall be a State monopoly. Alcoholic liquors shall be sold at retail only through the state stores and the agencies of the West Virginia Liquor Control Commission."

"The Commission may sell such liquors at wholesale to persons licensed to purchase at wholesale as provided in this chapter."

West Va. Code 5907 (29).

STATUTORY PROVISIONS—WEST VA. CODE

Limitation on Amount to Be Sold

"Not more than one gallon of alcoholic liquor shall be sold to a person at one time; but a sale in excess of one gallon may be made to a person licensed to purchase at wholesale, and to a religious organization purchasing wine for sacramental purposes."

West Va. Code 5907 (49).

PURCHASE & RESALE OF ALCOHOLIC LIQUORS & ALCOHOL BY WHOLESALE DRUGGISTS

"The Commission may grant to wholesale druggists license to purchase alcoholic liquors at wholesale from or through the commission for the purpose of resale within the State. Such wholesale druggists shall have the right to purchase ethyl alcohol, for non-beverage purposes, at wholesale, and for resale to pharmacists, or druggists or drug stores employing a duly licensed pharmacist, having a regular place of business, or to other persons licensed to purchase ethyl alcohol from the commission, from distillers, manufacturers, jobbers or other wholesale druggists, whether within or without the State, and whether the seller has a permit or license from the commission to sell same, and ship and transport or cause same to be shipped and transported to their place of business, upon filing with the commission at the time of or prior to such purchase a copy of the purchase order for same, together with a statement in writing showing approximately when, and in what manner the ethyl alcohol so purchased will be shipped or transported to their places of business."

West Va. Code 5907 (56).

LICENSE FOR PURCHASE AT WHOLESALE FOR INDUSTRIAL OR SCIENTIFIC USES; WINE FOR SACRAMENTAL PURPOSES

"The Commission may grant licenses to persons to purchase alcoholic liquors at wholesale from or through the West Virginia Liquor Control Commission for industrial, or scientific uses, or for use in institutions as provided in article six, section five (5907) (86) of this Chapter, and may, by special permit for such fee as the Commission may fix, authorize transactions at wholesale for the purchase of alcohol for scientific, chemical, mechanical or industrial purposes only; but, no license fee shall be required from institutions, departments, or agencies of the state government or any political subdivision thereof."

"The Commission may issue, without fee, special permits authorizing religious organizations to purchase, upon orders approved by the commission, wine for sacramental purposes."

West Va. Code 5907 (57).

PURCHASE AND RESALE OF ALCOHOLIC LIQUORS AND ETHYL ALCOHOL BY RETAIL DRUGGISTS

"The Commission may issue licenses to retail druggists to sell, upon prescription, and for the purposes provided for in this chapter, alcoholic liquors purchased from the Commission. Any pharmacist, or retail druggist or drug store employing a duly licensed pharmacist, having a regular place of business, may, upon filing with the Commission, at the time or prior to any purchase, a copy of the purchase order together with a written statement showing approximately when and in what manner any ethyl alcohol purchased will be shipped or transported, purchase from distillers, manufacturers, jobbers or wholesalers, whether within or without the State, and whether the seller has a permit or license to sell the same, ethyl alcohol for use in compounding or manufacturing any of the medical or

other preparations mentioned in section four (5907)—(75) of Article six of this chapter, and ship and transport or cause same to be shipped and transported to his place of business."

West Va. Code 5907 (58).